Supreme Court, U. S.
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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1620

ROBERT L. GILMORE,

Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party in Interest with Petitioner Gilmore in Proceedings Below,

vs

WEYERHAEUSER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT

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No.

ROBERT L. GILMORE,

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Party in Interest with Petitioner Gilmore in Proceedings Below,

vs.

WEYERHAEUSER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in this case on December 5, 1975.

OPINIONS BELOW

This matter arises under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The "Decision and Order" of the Administrative Law Judge filed on May 17, 1974, which has not been officially reported, is appended to this Petition as "Appendix D".

The "Decision" of the Benefits Review Board filed on November 12, 1974, which has been unofficially reported at 1 Benefits Review Board Service (BRBS) 180, is appended to this Petition as "Appendix C".

The opinion of the United States Court of Appeals for the Ninth Circuit filed on December 5, 1975, which has

been unofficially reported at 1975 AMC 2411, is appended to this Petition as "Appendix B".

The "Order" denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc filed by the United States Court of Appeals for the Ninth Circuit on February 9, 1976, which has not been reported, is appended to this Petition as "Appendix A".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 5, 1975. On December 29, 1975, the Court of Appeals entered an "Order" which stated: "Respondent Gilmore is allowed to, and including, December 30, 1975, in which to file his Petition for Rehearing." On December 24, 1975, Petitioner filed

a Petition for Rehearing and Suggestion for Rehearing En Banc. On February 9, 1976, the United States Court of Appeals for the Ninth Circuit entered its "Order" denying the Petition for Rehearing and rejecting the suggestion for rehearing en banc.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Whether sawmill workers, who suffer injury in the course of their regular employment upon navigable waters of the United States while sorting saw logs for a lumber mill, are within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

STATUTES INVOLVED

(1) The Longshoremen's and Harbor Workers' Compensation Act, as amended

in 1972:

LHWCA, 33 USC §901, 86 Stat. 1251:

> "§902(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

LHWCA, 33 USC §902(4), 86 Stat. 1251:

> "§902(4). The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

33 USC §903, 86 Stat. 1251, 1265:

"§903(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of -

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

* * * * *."

(2) The Longshoremen's and Harbor Workers' Compensation Act, prior to the 1972 Amendments:

LHWCA, 33 USC §902(3), 44 Stat. 1424; 52 Stat 1164:

"The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

LHWCA, 33 USC §902(4), 44 Stat. 1424; 52 Stat. 1164:

"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

LHWCA, 33 USC §903, 44 Stat. 1426:

"§903(a). Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensa-

tion proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of -

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

* * * * *."

STATEMENT OF THE CASE

Jurisdiction to review the decision of the Benefits Review Board was conferred upon the United States Court of Appeals for the Ninth Circuit by 29 USC §921(c) as amended October 27, 1972, Public Law 92-576, Sec. 15(a)(b), 86 Stat. 1261, 1262. Under the 1972 Amendments to the Longshoremen's and

Harbor Workers' Compensation Act, formal hearings on contested issues in claims arising under the Act are conducted before an Administrative Law Judge. 33 USC §919(d). A "party in interest" may appeal a decision of the Administrative Law Judge to a Benefits Review Board consisting of three members appointed by the Secretary of Labor. 33 USC §921(b). Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the Circuit in which the injury occurred. 33 USC §921(c).

The Solicitor of Labor submitted a brief to the Benefits Review Board in support of Petitioner's position, and also submitted a brief and made oral argument in the United States

Court of Appeals in support of Petitioner's position, although Petitioner was represented by his own attorneys in both the administrative proceeding and review by the Court of Appeals. 1/

The facts of this case are accurately set forth in the opinion of the Court of Appeals:

> "Claimant was employed as a 'pondman' by Weyerhaeuser at its sawmill in North Bend, Oregon. The sawmill is located on Coos Bay, a salt-water bay

1/ The Solicitor of Labor contends that the Office of Workers' Compensation Programs, United States Department of Labor, is a proper party to contested cases under the Harbor Workers' Act. Petitioner did not object to the appearance of the Solicitor of Labor in the proceedings below and indeed welcomed the Solicitor's support, although there is doubt whether the government is a proper or necessary party in contested proceedings under the Harbor Workers' Act. See ITO Corporation of Baltimore v. Benefits Review Board, 529 F2d 1080, 1089 (CA4, 1975),(petition for rehearing in banc granted).

> of the Pacific Ocean. Parts of the bay adjacent to the plant are enclosed by docks and log booms for the purpose of holding logs being processed and are known as 'ponds.' Claimant was injured when he fell from a floating walkway in one of these ponds.
>
> The logs are transported to the mill in log rafts by an independent tug and barge company whose employees tie up the rafts to floating docks. The rafts are then taken by Weyerhaeuser's employees driving 'log broncs' (14' to 16' boats powered by diesel engines) to the mill where the logs are removed from the water by a chain hoist and debarked. After debarking, the logs are dropped back into the water and routed to the above-mentioned ponds where they are sorted by pondmen such as Claimant and fed into the mill for processing into lumber or plywood. The finished product is then loaded aboard ship.
>
> At the time of his injury, the Claimant was working at his duties involving the sorting of logs and feeding them into the mill for processing. In performing these duties, he would move about on floating walkways (and occasionally

on the logs themselves), moving the logs by means of water jets and pike poles. He was required to wear a life jacket, hard hat, and cork boots. Claimant had no duties involving receiving the logs rafts at the docks, operating the log broncs, initially moving the logs into the mill for debarking or loading ships with the finished product. Claimant is a member of the International Woodworkers of America labor union and is not a longshoreman or affiliated with the International Longshoremen's and Warehousemen's Union. * * *"

Although not made the subject of specific findings in any of the decisions below, additional undisputed facts throw further light upon the nature of the Petitioner's employment. The Weyerhaeuser plant where Petitioner was employed is a giant industrial complex which spreads one mile along the shores of Coos Bay, Oregon (R. II, p. 11, 38). The plant has four divisions: particle

board, chips, sawmill and plywood (R. II, p. 11). All of the logs which are processed are brought to the Weyerhaeuser plant by water (R. II, p. 27). Ocean-going cargo vessels, including some vessels owned by Weyerhaeuser, are loaded with chips, lumber and plywood at a Weyerhaeuser dock on the plant site (R. II, p. 27), and as many as four vessels are routinely moored at the dock (R. II, p. 31). Nearly all of the products or goods which are shipped from the Weyerhaeuser dock, except certain paper craft products and a small percentage of chips, are processed through the Coos Bay plant (R. II, p. 28). Indeed, Weyerhaeuser stipulated that it was a "maritime employer within the [Harbor Workers'] Act", although disputing that Petitioner, at the time

of his accident, was engaged in maritime employment (R. II, p. 4, 28). The plywood pond where Petitioner was injured is about half a mile north of the area where the vessels load (R. II, p. 31).

Coos Bay is a "lumber port". Lumber, plywood and paper products are handled in the bay for foreign shipment (R. II, p. 30, 31). There are at least three timber companies other than Weyerhaeuser which have dock facilities at Coos Bay (R. II, p. 30). Coos Bay is formed by the Pacific Ocean, and the community of North Bend, where the Weyerhaeuser mill is located, is approximately two miles inland from the main shoreline of the Pacific Ocean (R. II, p. 10, 11).

The Administrative Law Judge

denied coverage upon the ground that claimant was not engaged in maritime employment and "would not have been covered by the Act as it read prior to the 1972 amendments because he was eligible for and received compensation under the Oregon Compensation Law" (Appendix D, p. 36). The Administrative Law Judge was apparently unfamiliar with Calbeck v. The Travelers Insurance Co., 370 US 114 (1962) in which this Court held that Congress, in enacting the Longshoremen's and Harbor Workers' Compensation Act, "* * * invoked its constitutional power so as to provide compensation for all injuries sustained by employees upon navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compen-

sation law." (370 US at 117).

On appeal, the Benefits Review Board reversed the Administrative Law Judge upon the ground that "[o]ne of the purposes of the 1972 Amendments to the Act was to extend coverage inland from the water's edge, not to narrow its scope." (Appendix C, p. 27). The Court of Appeals in turn reversed the Board, holding that decisions of Federal courts, including this Court, which construed the Harbor Workers' Act prior to the enactment of the 1972 Amendments are "* * * relegate[d] * * * to limbo" (Appendix B, p. 11), and that under the 1972 Amendments, "* * * to be entitled to the benefits of [the Act], an employee's employment must have a realistic relationship to the traditional work and duties of a ship's ser-

vice employment" (Appendix B, p. 16). At the same time, the Court of Appeals recognized that the Benefits Review Board was correct when it held that a purpose of the 1972 Amendments was "* * * to extend coverage inland from the water's edge, not to narrow its scope." (Appendix B, p. 9).

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit admittedly conflicts with this Court's decisions in Calbeck v. Travelers Insurance Co., 370 US 114 (1962) and Parker v. Motor Boat Sales, Inc., 314 US 244 (1941), disregards the intent of Congress as expressed in the legislative history of the 1972 Amendments to the Act and the Act itself, and reintroduces all the confusion concerning questions of coverage which this Court sought to eliminate

in Calbeck and Parker. The decision of the Ninth Circuit wrongfully excludes from the protection of the Harbor Workers' Act all workmen upon navigable waters who are not employed on or about cargo vessels.

This Court has always considered that loggers who venture upon navigable waters are engaged in maritime commerce, although , through a quirk of legal history, their work in years past has been characterized as "maritime but local". Prior to the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927 (March 4, 1927, C. 509, Sec. 1 et seq., 44 Stat. 1424), this Court had held, in Southern Pacific Co. v. Jensen, 244 US 205 (1917), that state compensation remedies could not constitutionally

reach workmen whose injuries were sustained upon navigable waters of the United States in the course of maritime employment. In subsequent years, the Court softened the impact of Jensen by holding that certain employments performed upon navigable waters involved matters of local concern only, so that application of state compensation remedies would work no material prejudice to the uniformity of maritime law. Included within this "maritime but local" classification were timber workers employed upon navigable waters. Rosengrant v. Havard, 273 US 664 (1927); Sultan Railway and Timber Co. v. Department of Labor and Industries, 277 US 135 (1928).

In 1927, Congress enacted the Longshoremen's and Harbor Workers'

Compensation Act. In 1942, this Court fashioned the "twilight zone", which had the effect of permitting any workman doubtfully within the "maritime but local" category to elect coverage under either state law or the federal Act. Davis v. Department of Labor and Industries, 317 US 249 (1942). See also, Gilmore & Black, The Law of Admiralty (2d ed), §649, p. 418.

In Parker v. Motor Boat Sales, 314 US 244 (1941), the Court held that a janitor for a recreational boating store, who was injured while participating in a test ride of a repaired outboard motor boat, the only occasion he had ever been on the water in the course of his employment, was within the coverage of the Harbor Workers' Act. Then, in Calbeck v. Travelers

Insurance Co., 370 US 114 (1962), the Court held that Congress, in enacting the Longshoremen's and Harbor Workers' Compensation Act, "* * * invoked its constitutional power so as to provide compensation for all injuries sustained by employees upon navigable waters, whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." 370 US at 117.

The Court reached that result even though Section 3(a) of the Act at that time provided compensation only "* * * if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law" and even though for many years antedating the enactment of the Harbor Workers' Act, state compensation

remedies could validly be provided to certain workmen injured upon navigable waters under the "maritime but local" doctrine.

By the decision in Calbeck, this Court put an end to many years of confusion (and litigation) over what classes of workmen injured upon navigable waters were within the coverage of the Harbor Workers' Act.

Seven years after Calbeck, the Court held, in Nacirema Operating Co. v. Johnson, 396 US 212 (1969), that the Harbor Workers' Act stopped at the water's edge; and that maritime workers injured upon piers, docks, and other land-based structures were not within the coverage of the Act, even though engaged in the loading or unloading of vessels at the time of injury.

In 1972, Congress enacted amendments to the Harbor Workers' Act which: (1) improved benefits while creating a ponderous administrative system for obtaining them; (2) eliminated the remedy of unseaworthiness, and (3) expanded coverage to certain workmen injured upon land adjoining navigable waters. Nothing in the Amendments or the legislative history of the Amendments suggests that Congress intended to withdraw already existing coverage from any class of workmen injured upon navigable waters. Indeed, the opinion of the Ninth Circuit at one point recognized that the purpose of the 1972 legislation "* * * was to extend coverage inland from the water's edge, not to narrow its scope." (Appendix B, p. 9). What Petitioner believes

to be the entire legislative history concerning this feature of the 1972 Amendments is set forth below. Thus, the identical Reports of the Senate Committee on Labor and Public Welfare (Senate Report 92-1125) and House Committee on Education and Welfare (House Report 92-1441) state:

> "The principal purpose of S. 2318 is to amend the Longshoremen's and Harbor Workers' Compensation Act in order to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate necessary administrative reforms." (Emphasis Added). (Legislative History, p. 63 2/).

2/ Page references are to the "Legislative History of the Longshoremens' and Harbor Workers' Compensation Act Amendments of 1972" prepared by the Sub-Committee on Labor of the Committee on Labor and Public Welfare, United States Senate (December 1972).

And again:

> "The bill also expands the coverage of this Act to cover injuries occurring in the contiguous dock areas related to longshore and ship repair work." (Emphasis added). (Legislative History, p. 64).

And again, under a section of the Report entitled "Extension of Coverage to Shoreside Areas":

> "The present Act, insofar as workmen and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on the land are covered by state workmen's laws. The result is a disparity in benefits payable for death or disability for the same type of injuries depending on which side of the water's edge and in which state the accident occurred.
>
> * * * * *
>
> The Committee believes that the compensation payable to a longshoreman or a ship re-

pairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshorement, harbor workers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. * * * The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up

stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendments. Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." (Emphasis added). (Legislative History, p. 74, 75).

And again, under the section by section analysis of the 1972 amendments:

"Section 2(a) amends Section 2(3) of the Act to define an 'employee' as any person

engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and shipbreaker. It does not exclude other employees traditionally covered but retains that part of 2(3) which excludes from the definition of 'employee' masters, crew members or persons engaged by the master to unload, load or repair vessels of less than eighteen tons net." (Emphasis added). (Legislative History, p. 78).

In House debate upon the 1972 amendments, one of the sponsors of the amendments, Congressman Steiger of Wisconsin, stated:

> "The present Act applies only with respect to injuries or deaths which occur upon the navigable waters of the United States. Injuries occurring on land are covered by state workmen's compensation laws. Thus, there is now a disparity in benefits payable for death or disability for the same type of injury depending on

> which side of the water's edge and in which state the accident occurs.
>
> This bill is designed to correct that disparity. It would extend coverage to injuries or death sustained on any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading or unloading, repairing or building a vessel. * * *" (Emphasis added). (Legislative History, p. 299).

Congressman Steiger further stated:

> The expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons customarily considered to be working in the business. Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harbor worker, whether engaged in repairing a vessel, or unloading it." (Emphasis added). (Legislative History, p. 298).
>
> The Legislative History has been

quoted at length to demonstrate that

Congress, in enacting the 1972 Amendments, had no intention of withdrawing coverage from workmen already entitled to benefits under pre-existing law.

Prior to the 1972 Amendments, the Act provided coverage "* * * in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law. * * * " (33 USC §903). In 1972, this section was amended to read:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *"

The definition of "employee" 3/, 33 USC §902(3) was expanded to read:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by

3/ Prior to the 1972 amendments the definition of employee was expressed in negative terms. The Act provided:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

> the master to load or unload or repair any small vessel under eighteen tons net."

The definition of "employer" was similarly expanded from its earlier definition, "* * * an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)", to "* * * an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 USC §902(4).

The Court of Appeals based its

decision upon the ground that a sawmill employee who works upon navigable waters is not a "person engaged in maritime employment" within the definition of the 1972 Amendments to the Harbor Workers' Act, and that "* * * to be entitled to the benefits of [the Act], an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment." (Appendix B, p. 16). The Court of Appeals held that decisions of the Federal courts which predate the 1972 Amendments are "* * * relegate[d] to limbo." (Appendix B, p. 11).

The Court of Appeals' decision is wrong from start to finish. By their terms, the 1972 Amendments cover all persons engaged in "maritime employment", excluding only Jones Act seaman and

persons employed about small vessels such as fishing craft, which could not reasonably be expected to afford Harbor Workers' Act coverage. The definition of maritime employment appearing at 33 USC §902(3) is not limited to, but merely includes longshoremen and harbor workers. Moreover, a mill worker whose duties are performed upon navigable waters has always been considered to be in "maritime employment". Rosengrant v. Havard, supra, 273 US 664 (1927); Sultan Railway and Timber Co. v. Department of Labor and Industries, 277 US 135 (1928). Indeed, the Federal courts have long held that the capacity for floating saw logs is an important test of the navigability of an American waterway. United States v. Appalachian Power Co., 311 US 377, 405-406 (1940);

State of Wisconsin v. Federal Power Commission, 214 F2d 334 (CA7, 1954); Iowa-Wisconsin Bridge Co. v. United States, 84 F Supp 852, 866 (Court of Claims, 1949). Finally, the intent of Congress in enacting the 1972 Amendments, recognized but not applied by the Court of Appeals, was to expand upon prior coverage. Accordingly, the Court of Appeals was not privileged to sweep Calbeck and Parker "into limbo".

CONCLUSION

The Court should grant certiorari, for the purpose of reaffirming its decisions in Calbeck and Parker, and on the merits should reverse the judgment of the United States Court of Appeals for the Ninth Circuit, and remand the

cause to that Court with directions to hold Petitioner is within the coverage of the Harbor Workers' Act.

Respectfully submitted,

RAYMOND J. CONBOY
Attorney for Petitioner

POZZI, WILSON & ATCHISON, Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WEYERHAEUSER COMPANY,	)	
	)	
Petitioner,	)	No. 74-3384
	)	
v.	)	
	)	ORDER
ROBERT L. GILMORE,	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
	)	
Respondents.	)	

Before: KILKENNY and GOODWIN, Circuit Judges, and EAST,* District Judge

The panel as constituted in the above-entitled case has voted unanimously to deny the petition for rehearing. Judge Goodwin voted to reject and Judges Kilkenny and East recommend the rejection of

* The Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WEYERHAEUSER COMPANY, Petitioner, vs. ROBERT L. GILMORE, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents.	)	No. 74-3384 OPINION

Upon Petition for Review of a Decision of the Benefits Review Board for the Director, Office of Workmen's Compensation Programs, United States Department of Labor

Before: KILKENNY and GOODWIN, Circuit Judges, and EAST, Senior District Judge *

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

EAST, Senior District Judge:

Weyerhaeuser Company (Weyerhaeuser) seeks a review of the decision issued by the Benefits Review Board (Board) for the Director, Office of Workmen's Compensation Programs, United States Department of Labor, (Respondent). That decision reversed a denial by an Administrative Law Judge (Law Judge) and granted the claim of Robert L. Gilmore (Claimant) for compensation under the Longshoremen's and Harborworkers' Compensation Act (LHCA), 33 U.S.C. §901, et seq. We reverse.

FACTS:

The following essential facts are undisputed:

Claimant was employed as a "pondman" by Weyerhaeuser at its sawmill in North Bend, Oregon. The sawmill is located on

Coos Bay, a salt-water bay of the Pacific Ocean. Parts of the bay adjacent to the plant are enclosed by docks and log booms for the purpose of holding logs being processed and are known as "ponds." Claimant was injured when he fell from a floating walkway in one of these ponds.

The logs are transported to the mill in log rafts by an independent tug and barge company whose employees tie up the rafts to floating docks. The rafts are then taken by Weyerhaeuser's employees driving "log broncs" (14' to 16' boats powered by diesel engines) to the mill where the logs are removed from the water by a chain hoist and debarked. After debarking, the logs are dropped back into the water and routed to the above-mentioned ponds where they are sorted by pondmen such as Claimant and fed into

the mill for processing into lumber or plywood. The finished product is then loaded aboard ship.

At the time of his injury, Claimant was working at his duties involving the sorting of logs and feeding them into the mill for processing. In performing these duties, he would move about on floating walkways (and occasionally on the logs themselves), moving the logs by means of water jets and pike poles. He was required to wear a life jacket, hard hat, and cork boots. Claimant had no duties involving receiving the log rafts at the dock, operating the log broncs, initially moving the logs into the mill for debarking or loading ships with the finished product. Claimant is a member of the International Woodworkers of America labor union and is not a longshoreman or

affiliated with the International Longshoremen's and Warehousemen's Union. He lost 21 days from work due to his injury and was paid benefits under the Oregon Workmen's Compensation Law.

PERTINENT STATUTES:

LHCA as amended on October 27, 1972, provides:

> Section 902(3): "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ."
>
> Section 903(a): "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability . . . results from an injury occurring upon the navgigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building

> way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

ISSUE ON REVIEW:

We deem the sole issue presented to be:

> Whether the Claimant was at the time of his injury an employee "engaged in maritime employment" within the purpose and purview of § 902(3) of the LHCA.

DISCUSSION:

The amendment, § 902(3), does not define the phrase "engaged in maritime employment" other than to indicate that the phrase includes "any longshoreman . . . harborworker . . . ship repairman," etc. So far as we are advised, no court has yet construed and given a definition to the phrase and most certainly the Board did not attempt to do so. Rather

the Board only reasoned that since claimant was injured on navigable waters and Weyerhaeuser had other employees engaged in maritime employment, the Claimant would have been covered under LHCA prior to the 1972 amendment; therefore, he is covered now. The Board correctly stated:

> "One of the purposes of the 1972 amendments to the Act was to extend coverage inland from the water's edge, not to narrow its scope."

The Board then inexplainably found and concluded:

> "[A]nyone covered under the Act prior to the 1972 amendments must indeed be permitted to come within its protection subsequent to the amendments.
>
> "The fact that claimant is called a pondman or millworker is irrelevant as to determining his qualifications as an employee within the terms of the Act. Therefore, the Board finds that Claimant's injury in the course of his employment was within the coverage

> of the Longshoremen's and Harbor-workers' Compensation Act, as amended, and he is entitled to benefits."

We cannot accept the Board's open door construction of the effect of the 1972 amendments to LHCA as a rational interpretation of the newly adopted 1972 prerequisite of eligibility of an employee to compensation, namely, that at the time of his injury he "be engaged in maritime employment."

The LHCA was first enacted in 1927 and it is of no help to recount, as does the Board's brief, the pre-1972 amendment decisions of the Supreme Court wrestling with the problem of finding admiralty jurisdiction to permit recovery by maritime workers for shore based injuries, or dealing with the complex problems created by the fictional "maritime, but local"

doctrine to adjust state compensation laws with exclusive federal maritime jurisdiction. See Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), and particularly the dissenting opinion of Mr.Justice Stewart commencing at page 132.

We relegate those decisions to limbo because it is obvious to us that the 1972 amendments radically changed the basis for an employee's entitlement to federal compensation. Prior to the amendment, an employee was entitled to federal compensation if his injuries occurred on navigable waters and his employer had an employee (not necessarily the injured employee) engaged in maritime employment; however, since the amendment, an employee is entitled to federal compensation only if he is engaged in maritime employment and he is injured on navigable waters or

an adjoining area customarily used for loading, unloading, repairing or building a vessel.

Thus, the 1972 amendments to the pertinent sections of LHCA eliminate the gray areas of jurisdiction under the former statute and place a clear line of demarcation between those employees entitled to the benefits of federal compensation and those entitled to recover under state law.

Further support for our thinking is found in the legislative history of the 1972 amendments. For example:

> "[T]he Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment

> would not be covered nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo . . . ." Committee on Labor and Public Welfare S. Rep. 92-1125 at 13, 92 Cong., 2d Sess. (1972).

The Board's erroneous conclusion that Claimant is entitled to LHCA benefits stems from a misinterpretation of the frequently stated "expansion" of coverage by the 1972 amendments. This expansion refers only to the broadened definition of "navigable waters," (maritime jurisdictional requirement) which now includes "adjoining" piers and other areas prescribed in §903(a). In expanding the maritime situs element of the Act, however, Congress clearly did not intend to broaden the class of covered employees to include <u>anyone</u> injured in an adjoining area. This intent is manifest in the

legislative history. In debate before the House, Representative William Steiger stated:

> "[T]he expansion of coverage is intended to bring about a measure of compensation uniformly applicable to persons customarily considered to be working in the business. Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it." 118 Cong. Rec. 36385, Part 27 (1972). (Emphasis added).

It is manifest to us that for the Board to have concluded that the Claimant would have been entitled to compensation prior to the amendment, it had to read into the phrase "any [employee] engaged in maritime employment" as still including the legislatively discarded prerequisite of the employer's status as a maritime employer. We cannot join in such an

"exercise in judicial legerdemain."

We join in the observation of the Law Judge that the intentof Congress in extending the Act was not to "open the doors" to all employees, but to minimize the adverse effect of a shoreside location or situs when a maritime employee is injured.

The original purpose of LHCA was to provide federal certainty of a fixed compensation for shore based ship side workers (longshoremen, etc.) who were injured in the course of their ship's service employment "without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within" admiralty jurisdiction. See Calbeck v. Travelers Insurance Co., supra, at 121-24.

The 1972 amended prerequisite of "maritime employment" is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee. In other words, the fixed federal compensation is provided in lieu of the uncertainty of a recovery by an injured ship worker for a maritime tort. The occupational hazards intended to be guarded against are the traditional hazards to ship's service employee arising in the course of his employment; i.e., the perils of the sea and an unseaworthy vessel recognized under maritime laws. Accordingly we believe that to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise the clear

and unambiguous congressional language of "maritime employment" is nullified and rendered to read "any employment."

We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters," with the further condition that the injury producing the disability occurred on navigable waters or adjoining area as defined in §903. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). See also Onley v. South Carolina Electric & Gas Company, 488 F.2d 758 (4th Cir. 1973), and Crosson v. Vance, 484 F.2d 840

(4th Cir. 1973).

The Law Judge thought that the Claimant at the time of the accident was not so "engaged in maritime employment" and denied the claim. The Law Judge reasoned that in order for the Claimant to recover:

> "[A] relationship should exist between the duties of Claimant and some maritime service, navigation or commerce on navigable waters . . . .
>
> "Here claimant was a mill worker. The navigable water [the log pond] was used as an easy means to transport logs from point to point in the manufacturing process and had no close relationship to any maritime activity. . . ."

The full significance of the Law Judge's reference to "the log pond" is more readily appreciated with an understanding of a Northwesterner's common knowledge of a sawmill's log pond operation. The "log pond" is a universal adjunct to a sawmill and is either: (1)

an artificial lake or pond dug or banked in dry uplands and fed by well or imported water, or (2) a log boom or other type of partitioned area of a stream, bay or other self-supplying body of water. The "log pond" of either type is maintained and used solely for the utilitarian floation method of holding, sorting, handling, and ultimate guidance of saw logs to and upon sub-surface chain conveyors which carry the saw log out of the log pond into the mill's sawing operation.

We find it illogical to think of a pondman's work and duties at or on an upland sawmill's log pond as "maritime employment" in the traditional sense. Neither do we believe that a bay side location or situs of a sawmill with its partitioned salt water log pond in any fashion changes the universal and custo-

mary nature of the pondman's work and ipso facto engages him in "maritime employment." Just as it was at the upland sawmill, there is still a total absence of any realistically substantial relationship of the pondman's work and duties at the bay side sawmill log pond to navigation or commerce upon navigable waters.

The Claimant's membership in a non-maritime union rather than in a maritime union speaks loudly for a joint labor-management practical and realistic construction of the nature of a pondman's work and duties as non-maritime employment.

Accordingly we conclude that the Claimant was not, in connection with his employment by Weyerhaeuser, engaged in maritime employment and is not entitled

to LHCA benefits.

The decision of the Board is vacated and the decision of the Law Judge is reinstated. The cause is remanded to the Board for appropriate decision and orders consistent herewith.

REVERSED AND REMANDED.

APPENDIX C

U. S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

ROBERT L. GILMORE,	)	
	)	
Petitioner-Claimant	)	
	)	
v.	)	BRB No.74-141
	)	
WEYERHAEUSER COMPANY,	)	
	)	DECISION
Employer	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY,	)	
	)	
Carrier	)	
	)	
Respondents	)	

Appeal from Decision and Order of John W. Earman, Administrative Law Judge, U. S. Department of Labor.

Donald R. Wilson and Raymond J. Conboy (Pozzi, Wilson & Atchison), Portland, Oregon for petitioner.

Paul N. Daigle and Gregory W. Byrne (Souther, Spaulding, Kinsey, Williamson & Schwabe), Portland, Oregon, for respondents.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor) for the Director, Office of Workers' Compensation Programs, U. S. Department of Labor, Washington, D. C.

Before: Washington, Chairperson, Hartman and Miller, Members

Washington, Chairperson

This is an appeal by the claimant from a decision and order (74-LHCA-85) of Administrative Law Judge Earman denying disability benefits under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. §901 et seq.

The claimant was injured in 1973 while working as a "pondman" for respondent, Weyerhaeuser Company, a manufacturer of forest products. The only issue for determination by the administrative law judge and this Board is whether the claimant's employment at the time of the injury occurred on

navigable waters, was maritime in nature and within the scope of coverage of the amended Act.

Claimant's work activity at the time of injury required that he stand and walk on a walkway of a log boom floating in the log or plywood pond which was a portion of Coos Bay, a navigable body of salt water. Claimant was required to wear a life jacket and cork boots. While claimant was sweeping one of the walkways on a boom, a plank gave way causing him to fall into tidewater. The injury resulted in temporary total disability for a period of three weeks.

Although the claimant asserted that he was working on navigable waters, the administrative law judge denied the claim finding that the claimant was not engaged in maritime employment and

therefore not covered by the Act.

The administrative law judge also found that because the claimant was able to receive compensation under the State of Oregon statute, he would have been precluded from recovering under the Longshoremen's Act prior to its amendment. This reasoning is untenable in light of the holding of the Supreme Court that the Act, unamended, covered "all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." Calbeck v. Travelers's Insurance Co., 370 U. S. 114 (1962); Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941); Peter v. Arrien, 325 F. Supp. 1361, aff'd 463 F.2d 253 (3d Cir. 1972).

Respondents' contention that the portion of the bay where the injury occurred was no longer navigable is equally without merit. The floating walkways or portable log booms, which were attached to the land only by chains and were occasionally rearranged or removed for dredging, do not come within the "extension of land" doctrine. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969); Luna v. Star of India, 356 F. Supp. 59 (S.D. Cal. 1973).

Prior to the 1972 amendments to the Act, the definition of "employee" was exclusory in nature. 33 U.S.C. §902(3). As amended, the exclusory language remains but there is a new language which defines an employee as "any person employed in maritime employment." This requirement was inserted

in order to limit the landward expansion of coverage in the amendment to Section 3(a) of the Act, 33 U.S.C. §903(a). This limitation is to ensure that employees who are not working in the shipbuilding or longshoring industries would not be brought within the ambit of the Act merely because they happened to be injured while on a pier, wharf, dry dock, terminal or other area adjoining navigable waters. Prior to the amendment of Section 3 of the Act, the requirement for coverage was merely that the disability result from an injury occurring on navigable waters. Parker v. Motor Boat Sales, Inc., supra.

One of the purposes of the 1972 amendments to the Act was to extend coverage inland from the water's edge, not to narrow its scope. The Board

find, therefore, that anyone covered under the Act prior to the 1972 amendments must indeed be permitted to come within its protection subsequent to the amendments.

The fact that claimant is called a pondman or mill worker is irrelevant as to determining his qualifications as an employee within the terms of the Act. Therefore, the Board finds that claimant's injury in the course of his employment was within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, as amended and he is entitled to benefits.

The decision of the administrative law judge is hereby reversed and case is remanded to the administrative law judge for appropriate action in accordance with this decision.

/s/ Ruth V. Washington
Ruth Washington, Chairperson

We Concur:

/s/ Ralph M. Hartman
Ralph M. Hartman, Member

/s/ Julius Miller
Julius Miller, Member

Dated this 12th day
of November, 1974.

APPENDIX D

U. S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D. C. 20210

IN THE MATTER OF

ROBERT L. GILMORE

Claimant

vs. Case No.74-LHCA-85
(Formerly 14-13135)

WEYERHAEUSER COMPANY

Employer

FIREMEN'S FUND INSURANCE COMPANY

Carrier

Donald R. Wilson, Esquire
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1100 S. W. Sixth Avenue
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For the Claimant

Paul N. Daigle, Esquire
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Williamson & Schwabe
Standard Plaza Building
Portland, Oregon 97204

For the Employer
and Carrier

Before: JOHN W. EARMAN
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U.S.C. 901, et seq.) a hearing was held in Portland, Oregon, on March 1, 1974. All parties were represented by counsel and were given full opportunity to be heard. The issues are whether (1) the injury was suffered in the navigable waters of the United States, and (2) the Claimant was engaged in maritime employment, so as to bring him within the coverage of the Act.

Findings of Fact and Conclusions of Law

I

On January 30, 1973, the Claimant was

employed as a "pondman" by the Weyerhaeuser Company in North Bend, Oregon. On that day while walking across a walkway at the plywood pond, the walkway gave way causing the Claimant to fall through into the pond. As a consequence of the fall, he suffered injuries diagnosed as contusion of the right thigh and contusion of the left rib cage with possible fracture of the tenth rib. He lost 21 days from work through March 19, 1973, and has been paid benefits under the Oregon Workmen's Compensation Law. His average weekly wages at the time of injury was $131.32.

The Employer is engaged in the manufacture of lumber and wood products and its liability under the Act is insured by Fireman's Fund Insurance Company.

In the manufacturing process logs are

floated to the mill on the waters of Coos Bay, which are navigable waters of the United States. The logs are then sent into the mill where the bark is removed and those logs destined to become plywood are cut into lengths and discharged into the "plywood pond," an area of Coos Bay which is separated from the remainder of the Bay by floating booms. The water in the plywood pond varies from 8 to 18 feet in depth, according to the tide.

The pond is separated by booms into three lanes. The logs are sorted and moved along the lanes by pondmen, such as Claimant, by the use of water jets and pike poles. The pondmen walk upon walkway constructed on the booms and are required to wear life jackets. The logs are moved into the mill where they are converted into plywood.

From time to time Claimant has operated the log moving boats called "broncs" and has moved the booms for dredging the area, as well as checking water depth for dredging. Claimant has no duties connected with the arrival of the logs at the mill or the removal of the product manufactured by the mill. His principal function is to move and grade the logs on their way from the debarking process to the mill where they are converted into plywood. The Employer admittedly has some maritime employees. Claimant is not a member of or affiliated with a longshoreman union but he is a member of the International Woodworkers of America.

Claimant argues that the injury occurred upon the navigable waters of the United States and therefore he is covered by the Act. The Carrier contends that Claimant

was not engaged in maritime employment and that his sole remedy is under the State of Oregon Workmen's Compensation Law.

II

Claimant was not engaged in maritime employment and was not covered by the Act.

Claimant advances the theory that where an employer has any maritime employees all other employees, if injured upon navigable waters, are covered by the Act, citing Peter v. Arrien, 325 F. Supp. 1361 (E.D. Pa. 1971); aff'd, 463 F. 2d 253 (3rd Cir. 1972). In that case, the employee was a crane operator working upon a temporary causeway in the process of removing a bridge and the employer had another employee who was a boat operator. We believe that the court's

decision in Peter v. Arrien, supra, does not apply to the Act as amended. Claimant would not have been covered by the Act as it read prior to the 1972 Amendments because he was eligible for and received compensation under the Oregon compensation law. On October 27, 1973, Section 3(a) of the Act (33 U.S.C. 903(a)) was amended, in part, by dropping the provision that Federal compensation is not available if State compensation could be provided. That section now reads in pertinent part:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel) ...."

Had Congress stopped after amending the coverage provisions, Claimant would prevail. But Congress also amended the definition of "employee" which must be read in conjunction with the above-quoted provision. Congress changed the negative definition which merely excluded certain classes of people and made it into a positive statement that could be interpreted without reference to other sections of the Act. It now reads:

> "(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker,..." 1/

1/ Section 2(3) (33 U.S.C. 902(3).

A short look at the legislative history will clarify the Congressional intent in drafting the new definition.

In a question and answer series submitted by Representative Steiger in debate on October 14, 1972 2/ the primary consideration for amending the definition of employee is stated as follows:

> ". . . Also, the definition of 'employee' is clarified by the amendments.
>
> "The latter change was made so that a determination of coverage

2/ Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (S.2318, Public Law 92-576) prepared by the Subcommittee on Labor and Public Welfare United States Senate, December 1972, U. S. Government Printing Office, p. 298.

> can be made on the basis of the definition of 'employee.' Under the present law that definition is so vague that the determination can be made on the basis of whether the injured individual was working for a covered 'employer.' The expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons customarily considered to be working in the business. Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it."

For additional clarification we find on page 13 of Senate Report No. 92-1125 3/ the following:

> ". . . The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they

3. Legislative History, page 75.

> are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. . . ."

The above clearly shows that by deleting the prohibition against coverage when State Compensation is available, Congress did not intend to open the doors to all employees injured upon navigable waters where the employer had other employees in maritime employment. Also, the position, taken by the court in Peter v. Arrien, supra, is inconsistent with the definition of employee as amended and is no longer applicable.

Much misunderstanding arises from the often voiced intent of Congress to broaden the Act. From our reading of the legislative history we see no intention to extend the classes of employees covered but, instead, to minimize the effect of the location where the injury may occur to covered maritime employees. It is also apparent that the title of the job held by the injured employee is not important; the distinguishing factor is the work he was performing. Olvera v. Miachalos, 307 F. Supp. 9 (S.D. Tex. 1968) and cases cited therein.

We paraphrase the court in Chapman v. City of Grosse Point Farms, 385 F. 2d 962 (6th Cir. 1967) 4/ when we say that

4/ The court was considering the relationship of navigable waters to admiralty jurisdiction.

a relationship should exist between the duties of Claimant and some maritime service, navigation or commerce on navigable waters. Absent such relationship, jurisdiction under the Act would depend entirely on navigable waters; a fact which in and of itself, in light of the historical justifications for the legislation, is quite immaterial to any meaningful implementation of the intent of Congress.

Here Claimant was a mill worker. The navigable water was used as an easy means to transport logs from point to point in the manufacturing process and had no close relationship to any maritime activity. The fact that some employees at a distant point were considered maritime workers is no longer controlling even though Claimant was injured on navigable waters. Under these circumstances,

the Claimant does not qualify as an employee within the terms of the Act.

In view of the above we need not consider the arguments so ably advanced by counsel concerning the extension of land doctrine.

Order

The claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act by Robert L. Gilmore is hereby denied.

/s/ John W. Earman
Administrative Law Judge

Dated: 17 MAY 1974
Washington, D. C.

Supreme Court, U. S.
FILED
JUN 9 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1620

ROBERT L. GILMORE,

Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party in Interest with Petitioner Gilmore in Proceedings Below,

vs.

WEYERHAEUSER COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH E. ROBERTS
1200 Standard Plaza
Portland, Oregon 97204
Attorney for Respondent

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IN THE SUPREME COURT

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ROBERT L. GILMORE,

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REASONS FOR DENYING THE WRIT

1. The Court of Appeal's decision is manifestly supported by the language

of the statute.

As one of his reasons offered for granting the writ, petitioner claims that the decision of the Court of Appeals "disregards the intent of Congress as expressed in the legislative history of the 1972 Amendments to the Act and the Act itself...." (Pet. 17) To the contrary, the Court of Appeals decision adopts the only reasonable interpretation of the statutory language.

The fundamental question involved here is whether petitioner is covered by the Longshoremen's and Harbor Worker's Compensation Act (LHCA). Under that Act, as it was amended in 1972, petitioner is entitled to coverage for injuries which occur on navigable waters provided he is employed by a maritime employer and is himself "engaged in maritime employment".

§902(3).

Respondent has admitted throughout that it is a maritime employer, i.e. that one or more of its employees (but not petitioner) are engaged in maritime employment. See §902(4). The Benefits Review Board held that petitioner was injured on navigable waters. Therefore, the sole issue decided by the Court of Appeals, as stated in its opinion, was:

> "Whether the Claimant [petitioner] was at the time of his injury an employee "engaged in maritime employment" within the purpose and purview of §902(3) of the LHCA." (Petition, App. B, page 8.)

The phrase "engaged in maritime employment" is not defined by the Act. This phrase was added by the 1972 Amendments, so that under the pre-amendment Act the petitioner would have been covered provided he was injured on navigable waters and was employed by a maritime

employer. The Benefits Review Board held that since petitioner would have been covered under the prior Act, and since the 1972 Amendments were intended by Congress to "extend coverage", petitioner must therefore be covered under the amended Act.

The Court of Appeals correctly rejected this fallacious reasoning because it completely ignored the statutory requirement that the claimant be engaged in maritime employment at the time of his injury.

The Court of Appeals addressed petitioner's argument, renewed here, that the legislative history of the 1972 Amendments supported the board's "expansion" reasoning. The court cited legislative history which contradicted petitioner's argument (see Petition,

App. B, pages 12-13, and concluded that petitioner as well as the board reached the "erroneous conclusion" that petitioner is entitled to LHCA benefits because of the frequently stated "expension" of coverage by the 1972 Amendments. The court pointed out that this expansion refers only to the definition of "navigable waters", which now includes adjoining areas such as piers. See §903(a).

The court then went on to define "maritime employment" consistently with this Court's decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), and Fourth Circuit decisions in Onley v. South Carolina Electric & Gas Company, 488 F.2d 758 (4th Cir. 1973), and Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973), namely, that the employees' duties

> "...must have a realistically significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters..." (Petition, App. B, page 17).

The court concluded that petitioner's duties did not fit this description. He was a sawmill worker, a member of a non-maritime union rather than a maritime union, whose duties fortuitously were performed adjacent to navigable waters.

2. The decision of the Ninth Circuit does not conflict with any decision of the Supreme Court.

Petitioner argues that the decision of the Ninth Circuit "admittedly" conflicts with this Court's decisions in Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962) and Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941). What petitioner ignores is the fact these decisions were rendered prior to the 1972

Amendments. Under the earlier Act, an employee was covered if he satisfied two tests: his injury occurred on navigable waters; and he was employed by a "maritime employer". The 1972 Amendments added the requirement that the employee himself be engaged in "maritime employment." Therefore, decisions under the pre-amendment Act did not address this issue.

Petitioner cites decisions of this Court which imply that employment is "maritime" if it occurs on navigable waters. See Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), Rosengrant v. Havard, 273 U.S. 664 (1927), and Sultan Railway v. Department of Labor, 277 U.S. 135 (1928). The issue before the Court in those cases, however, was whether the injury was suffered in a

maritime location and therefore subject to federal jurisdiction. As mentioned, the pre-amendment version of LHCA incorporated this locality or situs test. The use of a locality test in determining federal maritime tort jurisdiction has recently been criticized by this Court. See Executive Jet Aviation, Inc. v. City of Cleveland, supra.

The 1972 Amendments expressed Congress' abandonment of the locality test as the sole determinant of an employee's right to coverage. Now an employee must satisfy a status test, i.e., maritime employment, which obviously cannot be satisfied by the mere fact that an employee is injured on navigable waters. Therefore, any decision of this Court which expresses or implies that an

employee is "maritime" because he is injured on navigable waters would have no applicability to the amended LHCA.

CONCLUSION

Petitioner seeks coverage under the Act merely because he was injured on navigable waters. However, under the 1972 Amendments he must also be engaged in "maritime employment". If petitioner were held to be engaged in "maritime employment" because he was injured on navigable waters, the "maritime employment" requirement of §902(3) would be simply erased from the statute. The Ninth Circuit has construed "maritime employment" as employment having a direct or substantial relationship to navigation or commerce on navigable waters. This decision is consistent with this Court's decision in Executive

Jet Aviation, supra at 261, where the Court observed that

> "...reliance on relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

Respectfully submitted,

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Supreme Court, U. S.
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No. 75-1620

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT L. GILMORE, PETITIONER

v.

WEYERHAEUSER COMPANY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-21) is reported at 528 F. 2d 957. The opinion of the Benefits Review Board (Pet. App. 22-29) is reported at 1 BRBS 180.[1] The administrative law judge's decision (Pet. App. 30-43) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1975. A petition for rehearing and suggestion of rehearing *en banc* were denied on February 9, 1976 (Pet. App. 1-2). The petition for a writ

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[1]The Benefits Review Board Service, published by Matthew Bender & Co., is the reporter of the Board's decisions.

of certiorari was filed on May 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act eliminated the previously existing coverage of workers whose employment duties are performed upon navigable waters but do not pertain directly to traditional navigation.

STATUTES INVOLVED

1. Prior to its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 2(3), 44 Stat. 1425, 33 U.S.C. 902(3):

> The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a), 44 Stat. 1426, 33 U.S.C. 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251 *et seq.*, the Act now provides in relevant part:

Section 2(3), 86 Stat. 1251, 33 U.S.C. (Supp. IV) 902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a), 86 Stat. 1251, 33 U.S.C. (Supp. IV) 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT

On January 30, 1973, petitioner was injured while employed as a "pondman" by respondent Weyerhaeuser Company. Petitioner sorted debarked logs afloat in Coos Bay, Oregon, directing the logs to conveyor belts which fed them to his employer's mill for further processing. He worked on movable floating walkways,[2] and sometimes on the logs themselves, within Weyerhaeuser's "pond," a part of Coos Bay enclosed by floating log booms. See Pet. App. 23-24.

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[2]Petitioner fell from or through such a walkway into the water. He was disabled for 21 days as a result of this fall. Pet. App. 32.

Weyerhaeuser and its compensation insurance carrier resisted petitioner's claim for compensation, arguing that the injury is not within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.[3] An administrative law judge rejected petitioner's claim. He concluded that the injury would not have been covered by the Act prior to its amendment in 1972, and that the amendments had not extended the Act's coverage to workers whose employment duties bore no direct relationship to traditional maritime activity (Pet. App. 30-43).

The Benefits Review Board disagreed. It stated that the administrative law judge's assumption that petitioner's injury would not have been covered by the unamended Act was clearly erroneous (Pet. App. 25-26). The Board held that the amendments had not withdrawn the existing coverage of such injuries (*id.* at 26-28).

The court of appeals agreed with the Board's construction of the unamended Act but rejected its interpretation of the amendments. It held that by providing that an "employee" is "any person engaged in maritime employment" (Section 2(3), 33 U.S.C. (Supp. IV) 902(3)) Congress had repudiated decisions of this Court holding that the Act applies to workers injured during employment on navigable waters. The court of appeals therefore decided to "relegate [the Supreme Court's] decisions to limbo" (Pet. App. 11). Otherwise, it thought, "the clear and unambiguous congressional language of 'maritime employment' is nullified and rendered to read 'any employment.' " *Id.* at 16-17. The court held that petitioner's injury is not covered by the Act because his duties, although performed on navigable water, did not

[3]They paid petitioner the lesser compensation provided by an Oregon statute.

relate to "traditional maritime activity involving navigation and commerce on navigable waters" (*id.* at 17).

DISCUSSION

1. Petitioner's injury occurred on the navigable waters of the United States, and therefore he would have been covered by the Act if he had been injured prior to the Act's amendment in 1972. *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 117, 120, 124, 126-127. The Benefits Review Board so stated (Pet. App. 25-27), and the court of appeals did not disagree. But the court of appeals held that petitioner was not covered by the Act following its amendment; his employment was not "maritime" within the meaning of amended Section 2(3), the court held, because it had no "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' " (Pet. App. 17).

This standard is indistinguishable from the standard rejected in *Calbeck*, and it will produce the same enervating uncertainty that *Calbeck* laid to rest. Rather than "eliminat[ing] the gray areas of jurisdiction under the former statute and plac[ing] a clear line of demarcation" (Pet. App. 12) the amendments, as construed by the court of appeals, would recreate the "twilight zone" and the "maritime-but-local" distinctions that bred 35 years of unhappy litigation prior to *Calbeck*.

Nothing in the legislative history indicates that Congress sought to overturn *Calbeck* and resurrect, as a statutory matter, the constitutional subtleties of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, and their progeny. Quite the contrary, Congress desired to bring certainty to the resolution of claims for compensation. The Benefits

Review Board was faithful to the legislative plan, and the court of appeals is in error.

Were the court of appeals' rule established, it would be clear without the need for further litigation that workers like petitioner, whose employment on the water involved the sorting and movement of sawlogs in a single location, would be outside of the Act's protection. Such employees are engaged in "maritime but local" employment under the pre-*Calbeck* law. *Sultan Railway & Timber Co.* v. *Department of Labor & Industries*, 277 U.S. 135. But the court of appeals' rule would require a similar "maritime but local" inquiry to be made each time a new case was presented. There are thousands of different occupations on the water, and the "maritime but local" line is more nice than obvious. It was used in the interval between *Western Fuel* and *Calbeck* only because the Court had thought that constitutional and statutory interplay left no alternative. There is no reason to resurrect the doctrine as a *preferred* method of statutory construction.

2. The court of appeals concluded that this standard had been injected into the Act by the amendment to Section 2(3), which now defines an "employee" as one who is engaged in "maritime employment." But there is no support in the Act for the court's narrow construction of "maritime employment." Indeed, the opposite proposition is implicit in the many cases of this Court denominating certain employment, much like that of petitioner's, as "*maritime* but local." See, *e.g.*, *Sultan Railway & Timber Co.* v. *Department of Labor & Industries*, *supra*, 277 U.S. at 137. Cf. *Calbeck*, *supra*, 370 U.S. at 133 (Stewart, J., dissenting). Congress presumably understood this accepted definition of "maritime" employment when it included that time-tested word in the amendments. The foremost scholars

of the subject have agreed. Although they acknowledge that there may be uncertainty concerning the meaning of "maritime employment" as applied to accidents on land, Gilmore and Black find no similar uncertainty when the accident takes place on navigable waters. See Gilmore and Black, *The Law of Admiralty* 429-430 (2d ed. 1975): "[A]ny worker injured on navigable waters will continue to be covered (as he has been in the past) without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." See also 1A *Benedict on Admiralty* §17 (7th ed. 1973); Watson, *Broadened Coverage under the LHWCA*, 33 La. L. Rev. 683, 694 (1973).[4]

Whatever ambiguity there may be in the term "maritime employment" as applied to injuries on the navigable waters is resolved by the legislative history of the amendments. The Committee Reports indicate that the new language was intended to affect only the land-side coverage of the Act. The Senate Committee, which drafted the disputed language, explained that it—

> specifically includes any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. *It does not exclude other employees traditionally covered* * * * .

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 16 (1972); emphasis added. The Committee was fully aware that all

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[4] *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, is relied on by both the court of appeals (Pet. App. 17-18) and respondent Weyerhaeuser (Br. in Opp. 5, 8-10) for the proposition that maritime location is insufficient. *Executive Jet* dealt, however, only with the problem of invoking the law of admiralty in the absence of a statute, a problem quite distinct from that presented here.

employees whose work is performed on the water had traditionally been covered by the Act.[5]

We submit that the amendments make it clear that the Act covers employment that is "maritime" either by virtue of its performance on navigable waters or by virtue of its relation to commercial shipping. The court of appeals had read the first sense of "maritime employment" out of the Act.

3. The instant decision is the first to interpret the effect of the amendments upon the Act's coverage of injuries on navigable waters. Because there is not yet a conflict among the circuits, we did not file a petition for a writ of certiorari. The new shoreside coverage of the Act has produced a great deal of litigation, however, and there is already a conflict among the circuits concerning the meaning of "maritime employment" as applied to injuries on land.[6] The Department of Labor informs us that the decision in the instant case, by

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[5] *Calbeck* had been reprinted in its entirety in Hearings on S. 2318, S. 525, and S. 1547, before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 560-573 (1972). The witness who submitted it drew to the Committee's attention the fact that, under *Calbeck*, "all injuries to employees on navigable waters" were covered without regard to "whether their particular cases fell within or without state acts under the 'local concern' doctrine" (*id.* at 559).

[6] Compare *I.T.O. Corp.* v. *Benefits Review Board*, 529 F. 2d 1080 (C.A. 4) (rehearing *en banc* pending) (the Act covers only persons injured while loading or unloading ships), with *Pittston Stevedoring Corp.* v. *Dellaventura*, C.A. 2, No. 76-4042, decided July 1, 1976 (Friendly, J.) (the Act covers all persons engaged in stuffing and stripping cargo containers, and among persons performing more remote cargo-handling the Act covers at least those who also spend a significant part of their employment in such loading and unloading); *Stockman* v. *John T. Clark & Son*, C.A. 1, No. 75-1360, decided July 27, 1976 (same); and *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, C.A. 3, No. 75-2039, decided August 5, 1976 (the Act covers all persons engaged in the handling of water-borne cargo, from delivery to the terminal by the shipper through loading aboard ship, and from discharge through delivery to the land carrier). Other cases involving similar issues have been argued in the Fifth Circuit. Many more such cases are pending (but have not yet been argued) in the Second, Third, Fifth, and Ninth Circuits.

muddying previously clear waters, has provoked a spate of compensation disputes. We therefore believe that the question presented in this case ultimately will require resolution by this Court. Unless the Court believes it advisable to wait until other courts of appeals have addressed the problem, this would be an appropriate case in which to put the uncertainty to rest.

CONCLUSION

We do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

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